(16)

No. 88-1377

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

LOUIS W. SULLIVAN, Secretary of Health and Human Services,

Petitioner,

v.

BRIAN ZEBLEY, et al.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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RESPONDENTS' SUPPLEMENTAL BRIEF

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I. INTRODUCTION

Respondents file this brief in response to the Secretary's reply brief submitted to the Court on October 20, 1989. Pursuant to Rule 35.5, this brief is confined to a discussion of new matters raised by the Secretary in his reply brief, namely, pending legislation, contemplated changes in policy and the recent issuance of an agency staff report to the Senate Finance Committee concerning the SSI children's program.

II. THE PROPOSED LEGISLATION EVINCES CONGRESSIONAL DISAPPROVAL OF THE SECRETARY'S POLICY.

The Secretary has called attention to proposed legislation pending before the Congress concerning the Secretary's adjudication of children's SSI disability claims. (Reply Br. 18-19). The Secretary argues that, in light of the proposed legislation, the Court should overturn the Third Circuit's invalidation of his listings-only approach. (Reply Br. 19-20). In so arguing, the Secretary contradicts the contentions in his previous briefs to the Court.

In his opening brief, the Secretary argued that Congress has, by its silence, given *approval* of his stilted construction of 42 U.S.C. § 1382c(a)(3): "Congress has never drawn into question, much less altered, the Secretary's approach." (Pet. Br. 34-35). Now that Congress is in fact finally examining the issue that is the subject of this litigation, and adopting the *Zebley* court's finding that the Secretary's standards for adjudicating children's claims, far from being appropriate, are unnecessarily rigid and inflexible, *see Willeford* v. *Sec'y of HHS*, 824 F.2d 771, 774 (9th Cir. 1987) (Kennedy, J.) (referring to "mechanical" results from applying the listings-only approach in disabled widow(er)'s cases), he now argues that such viewpoints are irrelevant.

Pointed Congressional criticism has erupted now that the full import of the Secretary's listings-only policy has been brought to Congressional attention by the *Zebley* decision. In addition to the House bill cited by the Secretary, H.R. 3299, 101st Cong., 1st Sess., 135 Cong. Rec. H6131 (daily ed. Sept. 27, 1989) (passed as part of the budget reconciliation bill), two Senate bills also were proposed not long after the Third Circuit's decision.[1] These two bills, as well as the House bill cited by the Secretary, far from expressing disapproval of that decision, have *embraced* the substance of the Third Circuit's ruling. *See* H. R. 3299, § 10,222 (requiring "*individualized assessment* of the child's mental and physical impairments, *including functional limitations*, which prevent or significantly interfere with the activities of daily living appropriate to the age of the child.").

Similarly, the SSI Disabled Children's Eligibility Act of 1989, S. 1718 § 3(a), 101st Cong., 1st Sess. (Moynihan bill), "clarifies" current law so that "[p]oor disabled children should have the benefit of the same eligibility assessments available to disabled adults." 135 Cong. Rec. S12,472 (daily ed. Oct. 3, 1989) (statement of Sen. Moynihan). Section 3(a) of S. 1718 requires the Secretary to conduct "an assessment of the child's mental and physical impairments, including consideration of the limitations, singly and in combination, which prevent or significantly interfere with the activities of daily living." *See also* Supplemental Security Income Reform Act of 1989, S. 665, § 3(a), 101st Cong., 1st Sess., 135 Cong. Rec. S3110 (daily ed. Mar. 17, 1989) (Heinz bill) (child to be

[1] The Secretary omits reference to these bills, referring instead only to the Senate Finance Committee's recommendations for further study and internal, pre-effectuation reviews of decisions. (Reply Br. 19).

found disabled if he or she "suffers from any medically determinable physical or mental impairment which severely interferes with the activities of daily living. . . .").

In his comments accompanying the introduction of S. 665, Senator Heinz, citing examples of victims of the Secretary's current policies for adjudicating disability claims, noted that such people included a five-year old, Jason E.,[2]

> who was denied SSI benefits and Medicaid because the *rigid medical criteria the Social Security Administration uses in determining disability in children does not adequately consider the functional limitations caused by the disease or illness*. When Jason first applied for SSI, his combination of medical and functional problems did not meet the inflexible criteria the SSA required. Jason suffered from muscular dystrophy. He had difficulty walking, could not hold a pencil, needed help dressing and eating, and had difficulty speaking because of deteriorating mouth and vocal cords . . . . Unfortunately, by the time he did get benefits, he was totally confined to a wheelchair and had to be carried by his family.

135 Cong. Rec. S3110 (emphasis added).

Rather than suggesting acquiescence in or approval of the Secretary's policy, the proposed legislation clearly demonstrates Congress' *dissatisfaction* with the Secretary's approach. This is in stark contrast to *Bowen* v. *Yuckert*, 482 U.S. 137, 151-52 (1987), where three Congressional reports had given express approval of the Secretary's regulation.

[2] Jason's case is described in the *amicus* brief of Pennsylvania Protection and Advocacy, et al. at 44-46.

Even if none of these bills is enacted, such lack of final legislation could not support a conclusion of Congressional approval of the Secretary's policies. While sustained Congressional attention to a particular administrative construction of a statute, followed by *repeated* refusals to take action, can, in some circumstances, warrant an inference of Congressional acquiescence, *see, e.g.*, *Heckler* v. *Day*, 467 U.S. 104, 111-15, 118 n.30 (1984), this is the first session of Congress in which the issue before the Court has been specifically brought to Congress' attention. Further, Congress expressly considered the possibility that its pending action could be construed (or misconstrued) by the courts, and specifically disclaimed any position on this litigation.[3]

The bills pending in the Congress also demonstrate the weakness of the Secretary's position that a child's ability to engage in "age-appropriate activities," a standard utilized by the Secretary in his own regulations, *see* 20 C.F.R. § 416.994(c) (Resp. Br. 2a-3a), and his proposed children's mental health listings, 54 Fed. Reg. 33,238 (1989), is unworkable and "unduly subjective and ad hoc." (Reply Br. 16-18). Each of the three bills adopts an age-appropriate activities standard. Many in Congress thus

[3] The Senate Finance Committee expressly disclaims any position on the correctness of *Zebley:* "[T]his and other amendments . . . should [not] be interpreted by the courts as either supporting or not supporting the concept that an individualized functional assessment must be used in determining whether a child meets the definition of disability." 135 Cong. Rec. S13,205 (daily ed. Oct. 12, 1989). Given that Congressional inaction in the face of proposed legislation addressing a judicial decision is generally considered an inadequate basis for inferring anything, *see, e.g., United States* v. *Price*, 361 U.S. 304, 310-11 (1960), it is a particularly unhelpful interpretive tool where Congress has expressly refused to take a position.

join respondents and *amici* in believing in the workability of such a standard.

III. FUTURE REGULATORY ACTIONS THAT MAY BE ADOPTED DO NOT SUPPORT REVERSAL.

The Secretary also raises a number of proposed and contemplated regulatory actions purportedly bearing upon the issues in this case. What the Secretary *may* do in the future and that he is "considering various . . . measures," and "possible revisions" (Reply Br. 19), can play no part in a challenge to the *existing* regulatory scheme. The possibility of action to mitigate, but not eradicate, the effect of illegal policies is an entirely improper basis for allowing such illegality to continue. Protestations of repentance and reform will not avail a defendant unless it can be shown that there is a definitive, permanent reversal of policy. *Gwaltney of Smithfield* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 66-67 (1987). While even speculative improvements that will help disabled children obtain benefits to which they are entitled are to be applauded, such possibilities are irrelevant to the very real dispute before the Court.

A. "Possible Clarification" Of The Equivalence Policy Is Of No Import.

In an apparent attempt to meet the argument that he fails to make individualized functional assessments and despite the express declaration of SSR 83-19 that the "functional consequences of the impairments . . . *cannot* justify a determination of equivalence" (J.A. 240) (emphasis in original), the Secretary now asserts for the first time that this policy "was not intended to bar consideration of the functional impact of an unlisted impairment in deciding whether it is equal in severity to a listed impairment." (Reply Br. 15 n.10). He goes on to state, despite this

asserted innocuousness of the Ruling, "that consideration is being given to a *possible clarification* of SSR 83-19 on this point." (*Id.*) (emphasis added).

A change in the almost decade-long policy of SSR 83-19 at this time evinces a confirmation by the Secretary of the *Zebley* court's and respondent's critique of the limitations of the listing-only approach. The exclusion of an assessment of functional criteria is at the heart of SSR 83-19 (promulgated in 1983 retroactive to 1980). The Ruling makes plain that it is

> incorrect to consider whether the listing is equaled on the basis of an assessment of *overall* functional impairment . . . . The functional consequences of the impairments (i.e. RFC), irrespective of their nature or extent, *cannot* justify a determination of equivalence.

SSR 83-19 (J.A. 239-40) (emphasis in original). What euphemistically may be termed a "clarification" is more accurately termed an acknowledgement of error.[4]

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[4] As respondents have noted, the Secretary has taken starkly inconsistent positions on the relevance of a functional inquiry in making "equivalence" decisions. (Resp. Br. 32-33). In 1983, SSR 83-19, supplanting earlier instructions of 1974 endorsing such an inquiry (J.A. 97), declared that "[t]he functional consequences of the impairments . . . *cannot* justify a determination of equivalence." (emphasis in original).

In light of the clarity of this official proclamation, one wonders how any mere "clarification" could transform this specific prohibition into permission for "consideration of the functional impact of an unlisted impairment in deciding whether it is equal in severity to a listed impairment." (Reply Br. 15 n.10). To the contrary, if in fact the Secretary were to "clarify" SSR 83-19, so as to allow for consideration of the functional consequences, such clarification would constitute yet another about-face in his policy on equivalence. Such extraordinary lack of consistency belies the Secretary's contention that his interpretation of the statutory provision at issue has been "longstanding" and therefore is due deference. (Reply Br. 12).

B. Proposed Regulatory Action That May Be Taken Does Not Alter The Inherent Inadequacy Of The Listings-Only Approach.

Turning to possible regulatory action he might take, the Secretary points to the Notice of Proposed Rule Making ("NPRM") concerning the children's listings for mental impairments, and one concerning proposed listings for Down Syndrome and other Hereditary, Congenital and Acquired Disorders "scheduled for final publication in February 1990." (Reply Br. 19 n.6). Such proposals are of little significance as they do not bind the Secretary to do anything. *See American Trucking Ass'ns, Inc.* v. *Atchison, Topeka and Sante Fe Ry. Co.*, 387 U.S. 397, 415-16 (1967) (even final rules are subject to change). The Secretary's reliance upon these proposed administrative actions and the delay that is inevitable in their final adoption illustrates the inherent pitfalls of a listings-only approach as a means of adequately assessing a child's disabilities.

In April, 1986 after eight months of study, a group of experts convened by the Secretary recommended wholesale revision of the children's mental health listings.[5] The Secretary took no action on these recommendations even though he recognized that they were needed to "ensure that the medical criteria are up to date and consistent with the latest advances in medicine." 52 Fed. Reg. 40,295 (1987). Instead, in October, 1987, the Secretary published a Regulatory Agenda announcing his intention to publish a NPRM in July, 1988, with a final rule scheduled for July, 1989. *Id.* at 40, 294-95. The Secretary finally published

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[5] The April 1, 1986 cover letter and the actual recommendations of the Work Group are found in the Joint Appendix filed with the Third Circuit at 124.

the NPRM more than one year behind schedule in August, 1989. 54 Fed. Reg. 33,238. Now we are informed that a final rule will be published but no date is given.

The fate of the long awaited listing for Down Syndrome tells a similar story. This listing was published as an NPRM in October 1987. Now, the Secretary alleges that it is scheduled for final publication in February, 1990, a delay of two and one-half years. Obviously, adopting a listing that recognizes the existence of Down Syndrome, a disease known to the medical profession for decades and one that affects 54,000 children, is hardly innovative.[6] Such dilatory efforts are hardly an argument for overturning the Third Circuit's decision. Even these relatively easy steps take the Secretary years to adopt, leaving the listings far behind the state of the art and many children without needed benefits. Taken together, all this demonstrates the inherent inadequacy of relying upon a listings-only approach.

Children have had and are having their claims adjudicated, by the thousands, under what the American Medical Association has called the "woefully" outdated listings, Am. Br. of A.M.A. and Amer. Acad. of Pediatrics, et al. 22, inevitably leading to inappropriate denials as illustrated in the *amicus* briefs to the Court. *E.g.*, Am. Br. of Children's Defense Fund, et al. 8-33. While respondents have no objection to the listings as a valuable screening device, nor to their being brought up to date, the inherent lag between medical advances and the adop-

[6] Down syndrome is just one of thousands of known childhood afflictions which the Secretary has no plans to incorporate at any point in the foreseeable future into his listings. *See, e.g.*, Am. Br. of A.M.A. and Amer. Acad. of Pediatrics, et al. 22 and Am. Br. of the Nat'l Easter Seal Society, et al. 17 n.9.

tion of new standards renders impossible an assessment of many disabilities when the listings are used as the *exclusive* guide.[7] Unlike adults with impairments of "comparable severity," children are left with adjudication under outmoded standards.

IV. THE SECRETARY'S PRELIMINARY REPORT ON SSI CHILDHOOD DISABILITY SUPPORTS THE DECISION OF THE COURT OF APPEALS.

Along with his reply brief, the Secretary has lodged with the Court a remarkable report, SSA, Office of Disability, *Preliminary Staff Report: Childhood Disability Study* (Sept. 20, 1989) ("*Preliminary Report*"), that finds erroneous denial rates as high as 41.9% and makes recommendations for future policy changes, while attempting to cast the current system in the best light. This report, prepared by the Secretary for the Senate Finance Committee, touches on the issues in this case on several points: it demonstrates the inconsistent positions the Secretary has adopted on equivalence and it acknowledges the current system's failure to collect and consider all available evidence on functional impacts of impairments for *all* types of disabilities. Further, it urges inquiry into "age--

[7] The Secretary proffers as relevant his "consideration" of revising other listings as also warranting an overturning of the Third Circuit's decision. (Reply Br. 19-20). He states that "[p]roposed revisions in the children's musculoskeletal and cardiovascular listings are in the latter stages of administrative review prior to publication of a notice of proposed rulemaking." (*Id.* 19 n.16). Yet, with the astonishing 29% error rate that the Secretary has acknowledged for children with cardiovascular disorders (Reply Br. 19 & n.15), an anticipated regulatory process of several years again serves to illustrate the inherent inadequacies in a listings-only approach. Promises of action at some indefinite point years in the future are cold comfort indeed for children currently being denied benefits.

appropriate activities" despite the Secretary's claim that such inquiry is "amorphous" and unworkable. Finally, it documents that the SSI children's program is grossly unfair and riddled with erroneous denials.

In his reply brief, the Secretary tries to harmonize the inconsistencies in his policy on equivalency (Reply Br. 15 n.10), one of several inconsistencies discussed in respondents' brief in chief. (Resp. Br. 27-33). In so doing, he fails to note yet another glaring inconsistency in this policy as recently revealed in the *Preliminary Report*. This report specifically found the errors in adjudication in mental disability equivalency cases to be "almost exclusively based on the *failure to consider* how all documented impairments combined to affect a child's *overall functional capacity.*" *Preliminary Report*, Tab E, at 2 (emphasis added). The report goes on to conclude that "multiple impairments . . . must be . . . combined and considered with respect to the total limitation which they impose upon a child's functioning." *Id.*

In stark contrast, SSR 83-19 declares that "it is incorrect to consider whether the listing is equalled on the basis of *overall* functional impairment . . . ." (J.A. 239) (emphasis in original). Thus, in addition to SSR 83-19 constituting a departure from the SSA's original liberal equivalency policy (J.A. 97), a departure conceded by the Secretary (Reply Br. 15 n.10), the Secretary is apparently preparing to about-face, and plot yet another course with respect to his equivalency policy. Under these circumstances, it cannot seriously be contended that the Secretary's current interpretation of § 1382c(a)(3) has been "longstanding and consistently maintained" (Pet Br. 41), warranting any special deference.[8]

[8] Respondents find no fault with the concept of a theoretically liberalized "equivalence" policy, as endorsed in the Secretary's *Preliminary Report*. However, given the Secretary's flip-flopping on this and other policies directly applicable to the adjudication of children's SSI claims, such pronouncements hardly provide assurance that he will issue directives to state disability agencies and ALJ's mandating individualized functional assessments, as required by the statute. At most, they demonstrate that, his narrow and inflexible policies having been called to the public and Congress' attention, the Secretary may now be willing to declare on paper a return to his original equivalency policy.

The *Preliminary Report* also expends substantial energy explaining the large error rates found by SSA in its recent study. The report shows that *clearly* erroneous denials[9] were made in 41.9% of growth impairment cases; 28.6% of cardiovascular cases; 12.5% of digestive impairment cases and 10.4% of mental health cases. *Preliminary Report*, Tab D, at Table 3. The report attempts to explain these shocking statistics as being primarily a function of "collection of information on activities of daily living not [being] uniformly documented." *Id.*, Tab A, at 2. It therefore goes on to propose a new policy which will "provide a more detailed picture of a child's daily activities and the *effect* of his physical and/or mental impairment *on his ability to function.*" *Id.*, Tab B, at 2 (emphasis added). Of course, three of the four relevant listings make virtually no mention of functional limitations (Listing 100.00, 104.00 and 105.00); the mental health listings are acknowledged to be outmoded, requiring across-the-board limitations in function for a finding of disability.

Once again, respondents do not take issue with the Secretary's own criticisms of the SSI children's program

[9] The *Preliminary Report* looked only at denials and used a standard of "clear error." The report is silent as to how clear error was defined or how many more children would have been found disabled if a functional approach rather than existing policies were used.

or with his suggestions for improvement. The problem with these suggestions, however, is that there simply is no regulatory vehicle for the Secretary to *consider* most of these "effects," once they are documented, under the rigid listings-only approach. Indeed, the Secretary notes that, with children, "the impairment's effect on the activities of daily living" is a "prime consideration"; *id.*, Tab B, at 3, but the report, without any authority or data, paradoxically finds the stilted listings-only approach to be adequate, with "functional considerations" required only under specific listings where such is deemed "appropriate." *Id.*, Tab F, at 1. In sum, the Secretary recognizes the importance of collecting data concerning the functional effects of *all* impairments but, in the same breath, deprives adjudicators of any means of considering this data, except where a claimant fits in a particular listings pigeon-hole that allows for the introduction of such evidence. Given such contradictory positions, it is not surprising that alarmingly high error rates are commonplace.

The *Preliminary Report*, like the bills pending before Congress, also belies the Secretary's contention that the standard of "age-appropriate activities," as an analogue to substantial gainful activity, is "amorphous" (Pet. Br. 44), or "difficult" and "unduly subjective." (*Id.* 16-18). In the report, the Secretary specifically delineates the categories of questions to which the proposed "national form," designed to detail the effects of the child's impairments "on his ability to function," would be directed: (1) any changes in the child's activities since the condition began, (2) the ability of the child to care for his or her personal needs, (3) problems with "getting along" with family members, teachers and peers, and (4) being able to be "fully understood" by family, friends and strangers. *Preliminary Report*, Tab B, at 2-3. In the case of mental impairments, the Secretary elaborates on certain of these categories of age-appropriate activities as including: (1) ability to communicate, (2) level of cognitive function, and (3) socialization skills. *Id.*, Tab E, at 1. Further, the report notes that the revised mental listings are designed to address "*age-appropriate functioning* within the cognitive/communicative, social, personal/behavioral and concentration/persistence/pace developmental domains." *Id.*, Tab E, at 3 (emphasis added). Such inquiries show that the Secretary has virtually capitulated on a number of respondent's arguments; what remains is for the Secretary to adopt a decision-making process that allows for functional assessments to be made.

Respondents do not suggest that it will be a simple task for the Secretary to assess a child's impairments and how they effect the ability to engage in age-appropriate activities.[10] However, such a task is not unmanageable, as his own *Preliminary Report* concedes. Indeed, the Secretary already acknowledges therein that "additional effort may be needed in obtaining clear and comprehensive descriptions of developmental attainment and progression in the areas of communication, cognitive functioning and socialization skills, particularly in claimants aged 4 to 18." *Preliminary Report*, Tab E, at 1. Given this acknowledgement, it can hardly be contended by the

[10] Respondents note that an inquiry into function and its effect upon the ability to engage in age-appropriate activities is the only inquiry that they have suggested as a means of identifying childhood disabilities of "comparable severity." Thus, the Secretary's contention that respondents want him "to consider . . . unspecified non-medical factors (similar to the non-medical factors of age, education and work experience for an adult)" (Reply Br. 1), is baseless.

Secretary in this litigation that the age-appropriate standard is amorphous and unworkable.

V. CONCLUSION

For the foregoing reasons and those stated in respondents' opening brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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